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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/798,292	03/12/2004	William H. Velke		6440

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CANADA

EXAMINER

COCKS, JOSIAH C

ART UNIT	PAPER NUMBER
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3749

DATE MAILED: 09/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/798,292

Applicant(s)

VELKE, WILLIAM H.

Examiner

Josiah Cocks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2005 and 20 July 2005.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 49-70 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 49-70 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 April 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination ("RCE") under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's RCE and amendment filed on 4/11/2005 have been entered.

Information Disclosure Statement

2. Applicant has been advised that the listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." In the response filed 4/11/2005 applicant indicates a desire not to include the references listed in the specification in a separate paper.

Specification

3. The amendments to the specification filed 7/20/2005 have been entered. In response to applicant's request from the response filed 4/11/2005 that the examiner should make such changes regarding minor informalities, the examiner notes that informal examiner's amendments

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of the type requested by applicant are no longer permitted in patent applications that are considered Image File Wrapper (IFW) applications (see, for example, MPEP § 1302.04). Should the examiner make such amendments, a formal examiner's amendment must be prepared. Such an amendment is only proper when the application is a condition for allowance. However, as noted above, applicant has prepared an amendment to make the changes in the specification, which has been entered.

Drawings

4. The drawings were received on 4/11/2005 with subsequent explanatory comments received 7/20/2005. These drawings are accepted by the examiner. As previously required, the drawings now identify the insulating material of the claims

The prior Office action also objected to the drawings as not showing heat transfer zones being operated from a source other than the combustion or exhaust gas vent area of the combustion mechanism (now claims 53 and 65). In response, applicant asserts that the presence of heat exchanger (7) not being attached to the flue stack (10) must necessarily be considered that this heat exchanger is being heated from another source. The examiner agrees. The prior drawing objection is withdrawn.

Claim Rejections - 35 USC § 112, first paragraph

5. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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6. Claim 59 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

See MPEP § 2163.06.

The original disclosure does not provide support for the fuel being suspended coal dust or a coal dust slurry (now claim 59).

In regard to applicant's arguments filed 4/11/2005 relating to the recitation of suspended coal dust or a coal dust slurry, such a recitation of this particular type of fuel source was not included in the original application as filed. Applicant's specification broadly disclosed the use of fluid hydrocarbon fuel but did not refer to "suspended coal dust" or a "coal dust slurry." It has been held that the introduction of claim changes which involve narrowing the claims by introducing elements or limitations which are not supported by the as-filed disclosure is a violation of the written description requirements of 35 U.S.C. 112, first paragraph. See MPEP 2163.05(II) (citing *Fujikawa v. Wattanasin*, 93 F.3d 1559, 1571, 39 USPQ2d 1895, 1905 (Fed. Cir. 1996)). Accordingly, the recitation of "suspended coal dust" or "coal dust slurry" serves to narrow the claims in a manner that was not supported by the as-filed disclosure.

In regard to the recitation of the ranges in the claims as to the upper and lower limits of the fuel and air temperatures, namely:

- 165 degrees Fahrenheit to the fuel's flash point of auto ignition temperature
(claims 49 and 61)

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- the narrower recitation of 165 degrees to 900 degrees Fahrenheit (claims 54 and 66)
- Between plus 50 and minus 40 degrees Fahrenheit (claims 49 and 61).

Pursuant to applicant's arguments and supported by the holding of the court in *In re Wertheim*, the examiner considers that these narrower ranges cited in the specification and applicant's claims as originally filed (see applicant's specification page 5, and original claims 1, 4, 7, 14, 17, and 20) meet the description requirement of 35 USC 112, first paragraph because they are within the broad ranges originally disclosed by applicant. See MPEP 2163.05(III) (citing *In re Wertheim*, 541 F.2d 257, 191, USPQ 90 (CCPA 1976)). Accordingly, the prior rejections of the claims under this section are withdrawn.

However, there is no evidence of record to support an assertion of criticality of these narrower temperature ranges. While applicant's arguments submitted 4/11/2005 may possibly be considered an indication that applicant considers the narrow temperatures ranges now claimed to be distinct from the broad recitation (such as that of U.S. Patent No. 6,736,118) there is simply no evidence of record to support such an assertion.

Double Patenting

7. In the response filed 4/11/2005, applicant provided substantial arguments as to perceived errors in the double patenting rejections that have been applied during the prosecution of this application. Applicant has relied upon 35 U.S.C. 121 to assert that neither applicant's prior parent U.S. Patent No. 6,736,118 nor co-pending application 10/798,294 may be applied as there

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was a restriction requirement made in the parent Patent No. 6,736,118. However, reliance on this statute is limited to those claims of the divisional applications that are drawn to an invention that was asserted to be an independent and distinct invention in the restriction requirement. The prohibition does not apply where the divisional applications includes claims that are drawn to the same invention that has already been patented. See MPEP 801.04 (F) and the paragraph following (F).

Accordingly, where applicant submits claims in this application that are of a scope that is not patentably distinct from a claim already patented in Patent No. 6,736,118, such claims are not drawn to an independent or distinct invention. As applicant is aware, the restriction requirement was made on the basis of classification of the combustion mechanism, (i.e. various types of heaters, gas turbine engine, etc.) (note page 34 of applicant's response in which applicant identified the categories of invention that were subject to restriction). Turning to applicant's claims in this application, the examiner notes that only claims 56 and 57 include subject matter that was identified in the restriction requirement to be an independent invention. The invention specified, for instance in applicant's new claim 49, is not related to an invention that was considered independent or distinct in the restriction requirement of the parent patent. However, the examiner notes that the claims of this application as now presented are considered distinct from the claims of the parent patent No. 6,736,118 for reasons unrelated to the restriction requirement that was made in the parent patent. The method claims as now presented in this application include a different statement of the method (as appears in the preamble) and include different temperature ranges for the heating and cooling of the feeds.

Further, a similar analysis applies to double patenting rejections made between the divisional child applications of the patented parent. Applicant should note that the prior double patenting rejection made between the two divisional applications (this application and application 10/792,294, see Office Action mailed 3/4/2005) was proper, as the claims of this application that were made a part of the rejection were identical in both language and scope to the corresponding claims of application 10/792,294. Applicant should have noted that those dependent claims that specified the type of combustion mechanism (e.g. former claims 34 and 35 of this application) were not included in the statement of the grounds of the double patenting rejection.

The examiner does note that in the initial Office Action mailed 11/16/2004, in addition to the statutory double patenting rejection made under 35 USC 101, double patenting rejections based on the judicially created doctrine of obviousness-type double patenting were made for the remainder of the claims. In response to this requirement (see response of 12/26/2004) applicant modified the scope of the claims but also pointed out that some of the prior dependent claims included the obviousness type double patenting rejection were those drawn to inventions that were to subject to restriction in the parent patent (e.g. dependent claims reciting the combustion mechanism to be a furnace or a process heater). In this regard applicant was correct and the double patenting rejection of claims drawn to those inventions, which were considered by the examiner of the parent patent to be distinct, was not maintained.

8. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or

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improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

9. Claims 49-55 and 58-70 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 65-70 and 72-84 of copending Application No. 10/798,294.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the only distinctions between these claims of this application and the relevant claims of Application No. 10/798,294 is the narrowing of the ranges for the cooling temperature of the air feed. These distinctions are not considered to be patentably distinct. Regarding these cooling ranges, there is no evidence to suggest any criticality associated with the temperature ranges (i.e. the lower limit of plus 50) now claimed. While the lower limit of plus 50 does

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appear to be within the broader range of ambient to minus 40 (as originally claimed in claim 1) there is no rationale for the selection of plus 50 degrees. Why and with what support has applicant select plus 50 degrees Fahrenheit? Absent some evidence showing new or unexpected results to establish criticality for the claimed range, a person of ordinary skill in the art would reasonably consider any range selected (such as plus 50 to minus 40 degrees Fahrenheit) within the broad range (i.e. ambient to minus 40 degrees Fahrenheit) to be obvious based simply on the level of cooling desired. Accordingly, these ranges are considered obvious range selections of those described in the co-pending application 10/798,294

In regard to the device claims, the relevant claims of the two applications are distinguished only in the recitation of the cooling temperatures that result from heating and cooling of the air feed by the heat exchanger assembly. The examiner considers that the structures of each of the device claims would be capable of achieving all of the temperature ranges recited. Accordingly, the structure claims of these two applications are also not considered to be patentably distinct from one another.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

10. Applicant should note that the applicant's reliance on 35 USC 121 as relates to the claims of the application that are drawn to an invention that was made part of the restriction requirement of the parent Patent No. 6,736,118 is correct. This requirement distinguished between specific types of combustion mechanism. Accordingly, claim 56 and 57, which limit the combustion

mechanism to a furnace and to a process heater **are not** subject to the double patenting rejections made above.

Further, as should now be clear to applicant, there is no prohibition stemming from 35 USC 121 for the double patenting rejection made above. However, it would appear that any future double patenting rejection based on the co-pending application 10/794,294 applied to this application would be overcome were applicant to substitute the term “process heater” or “furnace” for each occurrence of the term “combustion mechanism” appearing in the claims in order to limit the claims of this application to a distinct invention as was defined in the restriction requirement of the parent patent.

Claim Rejections - 35 USC § 102

11. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

12. Claims 49, 51, 54, 55, 58-61, 63, 66-68, and 70 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 3,720,057 to Arenson (“Arenson”).

Arenson discloses in Figures 1-4 the invention described in applicant’s claims 49, 51, 54, 55, 58-61, 63, 66-68, and 70. In particular, in Figure 3 Arenson shows a process and device where a first exchanger assembly (116) extends through a first heat transfer zone related to the combustion mechanism and a second heat exchanger assembly (126) extending through a second heat transfer zone of the combustion mechanism. The fuel supplied through conduit (120) is

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heated at exchanger (116), which is heated by exhaust gases from a combustion mechanism conveyed through line (114). Air is conveyed through conduit (128) to the second heat exchanger (126). Example 2 (beginning in column 12) shows that natural gas is heated in the same manner proposed by applicant in order to leave heat exchanger (116) at a temperature of 168 degrees F (see col. 12, line 49) and that air is cooled in the same manner proposed by applicant in order to leave heat exchanger (126) at a temperature of 40 degrees F (see col. 12, line 32). These specific examples fall within applicant's claimed temperature ranges. Further, the examiner considers that as the process described in Arenson is identical to that of applicant's invention, any change in the fuel mass to combustion air mass would also occur in the process of Arenson.

In regard to claims 55 and 68, in order for the combustion device (gas turbine engine 112) of Arenson to operate there is necessarily some means for converting the oxidation mixture of fuel and air into high temperature, high velocity combustion products. Further, as shown in Figure 1, the exhaust products are used to heat a first heat exchanger (32) and an additional heat exchanger (46), which is considered to be a related energy transfer system.

In regard to applicant's device claims (i.e. beginning with claims 61), the recitation of the temperatures to which the fuel is heated and the air cooled are simply statements of the intended use of the heat exchangers (i.e. to function to heat and cool the respective feeds). A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative

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difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In this case, even if Arenson were not considered to disclose points within the temperature ranges recited by applicant (which it does, as noted above), the examiner considers that the heat exchangers disclosed by Arenson would be capable of heating and cooling to the temperatures recited and these meet the structural limitations of the claim.

Claim Rejections - 35 USC § 103

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

14. Claims 50, 52, 53, 56, 57, 62, 64, 65, and 69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Arenson as applied to the claims in item 12 above and further in view of U.S. Patent No. 5,888,060 to Velke ("Velke")

Arenson discloses all the limitations of claims 50, 52, 53, 56, 57, 62, 64, 65, and 69 except for an insulating or heat storage material forming part of the heat exchanger assemblies, one of the heat transfer zones being related to the combustion area of the combustion mechanism, and that the combustion mechanism is a furnace or process heater.

Velke teaches a device for pre-heating fluid to decrease its density and thus increase efficiency that is considered analogous prior art. In Velke, a heat storage material forms part of a

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heat exchanger assembly (see col. 4, lines 18-23) for the purpose of equalizing heat transfer from the heating zone to the heat exchanger during on/off cycles of the appliance. Velke also teaches the use of insulating material (21) in the heat exchanger shown in Figure 4 for the purpose of protecting against external heat loss. Velke also teaches that the heat transfer zone is operated from a source other than the combustion or exhaust gas vent area of the combustion mechanism in the case that access to such heat source locations is difficult (see col. 4, lines 16-18). Velke further teaches the use of a heat transfer zone being related to the combustion area of the combustion mechanism for the purpose of increasing efficiency of the appliance (see the abstract). The fuel employed is natural gas, propane gas, or other conventional fluid hydrocarbon fuel (see col. 3, lines 64-65).

In regard to claims 56 and 57, the combustion device disclosed in Velke is a combustion appliance that may be a furnace or heating devices (see col. 4, lines 45-46 and col. 8, lines 45-51).

Therefore, in regard to claims 50, 52, 53, 56, 57, 62, 64, 65, and 69, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the device of Arenson: to incorporate the heat storage material and insulating material as taught by Velke to equalize heat transfer from the heating zone to the heat exchanger during on/off cycles of the appliance or to protect against external heat loss; to incorporate the heat transfer zone being operated from a source other than the combustion or exhaust gas vent area of the combustion mechanism as taught in Velke in the case that such heat source location is difficult to reach (see Velke, col. 4, lines 16-18); and to incorporate heat transfer zone being related to the combustion area of the combustion mechanism as taught by Velke for the purpose of increasing

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the efficiency of the appliance. Further, it would have been obvious to a person of ordinary skill in the art to substitute a process heater or furnace as taught in Velke for the gas engine of Arenson as these combustion devices are well known to produce a exhaust gas that may be used for heating a fuel feed. This substitution is based on the location and environment intended to receive the gas combustion appliance. For example, if the environment receiving the combustion device is a commercial roof top then a process or space heater would be selected as the type of combustion device (see Velke, col. 9, lines 31-41).

Response to Arguments

15. Applicant's arguments filed 4/11/2005 as to the prior art rejections have been fully considered but they are not persuasive.

Regarding Prior Art

Applicant argues that the Arenson reference and that of Velke do not claim the invention as recited in applicant's claims. However, an assertion that references do not **claim** the same invention as applicant is irrelevant. The relevant consideration is what these references **disclose or describe** to a person of ordinary skill in the art. What these references disclose or describe is that appearing in the patent as a whole and not merely what these references are claiming (note the statutory language identified above for 35 USC 102 and 103). As noted above, the examiner has identified both method steps and structure present in the prior art, upon which applicant's claims read.

Further, applicant makes the following statement:

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“The Examiner is again using dependent Claims in his comparison without referencing and including the basic invention which is specifically disclosed in the independent claim.” (see response, page 50).

This remark is incomprehensible. Applicant appears unfamiliar with the Office practice of the statement of the grounds of rejection. As is readily understood from the statement of the rejections (both in the prior Office action and noted above), applicant's independent claims and some dependent claims were found to be anticipated under 35 USC 102 based on the Arenson reference (note item 12 above). The remaining dependent claims contained subject matter that was admitted by the examiner not to be disclosed in Arenson. However, the limitations of these remaining dependent claims were found to be obvious under 35 USC 103 based on the combination of Arenson and Velke (note item 14 above). As is plainly evident from the statement of the grounds of rejection, those claim limitations not present in Arenson were found to be obvious based on the teachings of Velke for the reasons set forth above.

Applicant also argues that applicant's invention is distinct from Arenson because applicant's independent claims “make specific reference to a hydrocarbon being a fluid” (see response of 4/11/05, page 40). However, as made clear in Arenson, (for example, see example 2, column 12) Arenson includes the use of a liquefied natural gas (i.e. a fluid fuel) that is heated by a heat exchanger (116) in the same manner proposed by applicant to an example temperature of 168 degrees Fahrenheit (see col. 12, line 49). Combustion air is also passed through a second heat exchanger (126) and undergoes cooling, in the same manner proposed by applicant, to an example temperature of 40 degrees Fahrenheit (see col. 12, line 32). Arenson is clearly concerned with a fluid hydrocarbon fuel and combustion air that is acted on in the same manner proposed by applicant.

Applicant's claims are not considered to read over the prior art.

Regarding Finality

Applicant also argues that the Finality of the prior Office Action was improper. However, the examiner notes that by the amendment applicant presented claims of a scope not yet considered by the examiner. Applicant's assertion that these new claim limitations should have been expected by the examiner is unfounded. As noted above, applicant is selecting limiting ranges in the claims, the criticality of which is not suggested in applicant's disclosure. In response to the presentation of these new claims, as required, the examiner performed an examination that resulted in these claims being rejected based, among other things, on the prior art.

On page 59, applicant makes the statement that when amending claim 1 (rewritten as claim 27) "the only amendment and change in substance occurred in the preamble portion of the claim." **This statement is absolutely and unquestionably in error.** Claim 1, as originally presented was identical in both language and scope to claim 1 of the allowed parent Patent No. 6,736,118 (see claim listing filed 3/12/2004). By statute (35 USC 101) this claim was not patentable to applicant. As was required, the examiner made a statutory double patenting rejection pursuant to 35 USC 101. In response to this rejection, applicant included new method claim 27 that now recites "a method for reducing fuel density while increasing combustion air density...." (as opposed to "a method for improving combustion efficiency...") **AND** modified the operating temperature level range to recite between plus 50 and minus 25 degrees Fahrenheit (as opposed to the prior range of ambient to minus 40 degrees Fahrenheit). Applicant's representation that only the preamble portion of the claim was changed is clearly false. Further,

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both of these amendments are properly regarded to be changing the scope of the claim. Also, applicant provided substantial substantive changes to the apparatus claims (claim 39). The claim(s) as presented in the filing of 12/26/2004 were clearly of different scopes than those previously presented and necessitated further examination.

The finality of the prior Office Action is considered proper.

Regarding application's submission of the ETV Environmental Report

Applicant submits the ETV report purportedly as evidence of the level of ordinary skill in art. However, this report is submitted merely in the form or arguments made by applicant and not in the form of a declaration or affidavit under 37 CFR 1.132. Objective evidence must be supported by an appropriate declaration or affidavit to be of probative value. See MPEP

716.01(I), (II), and (III).

Accordingly, this ETV report is considered persuasive in overcoming the rejections based on the prior art.

Conclusion

16. This action is made non-final. A THREE (3) MONTH shortened statutory period for reply has been set. Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.

17. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Josiah Cocks whose telephone number is


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(571) 272-4874. The examiner can normally be reached on weekdays from 8:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Monica Carter, can be reached at (571) 272-4475. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://portal.uspto.gov/external/portal/pair>. Any questions on access to the Private PAIR system should be directed to the Electronic Business Center (EBC) at (866) 217-9197 (toll-free).

jcc
September 27, 2005


JOSIAH COCKS
PRIMARY EXAMINER
ART UNIT 3749